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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

SOUTH CENTRAL BELL TELEPHONE COMPANY, *et al.*,
Petitioners,

v.

STATE OF ALABAMA AND
STATE DEPARTMENT OF REVENUE,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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BRIEF OF *AMICUS CURIAE* TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* TAX EXECUTIVES INSTITUTE, INC. IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

Pursuant to Rule 37 of the Rules of the Supreme Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari.[1] Tax Executives Institute (hereinafter

[1] Pursuant to Rule 37.6, *amicus* TEI states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this

"TEI" or "the Institute") is a voluntary, nonprofit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and currently has approximately 5,000 members who represent nearly 2,800 of the leading businesses in the United States and Canada, nearly all of which are engaged in interstate commerce.

The members of the Institute represent a cross-section of the business community in North America. The Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation, to reducing the costs and burdens of administration and compliance to the benefit of both the government and taxpayers, and to vindicating the Commerce Clause and due process rights of business taxpayers.

Tax Executives Institute's members have a vital interest in the resolution of this case. Even those members whose companies are not doing business in Alabama are, almost without exception, engaged in interstate commerce. Consequently, they benefit from, and are entitled to, the protection afforded by the Commerce Clause and Due Process Clause of the United States Constitution. The potential diminution of that protection—which is clearly portended by the Alabama Supreme Court's decision—is of material concern to the Institute and all its members.

SUMMARY OF ARGUMENT

This case involves the questions whether Alabama's franchise tax on out-of-state corporations contravenes the Commerce Clause of the Constitution and, further, whether the State's theory of *res judicata* operates to deny taxpay-

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brief. Tax Executives Institute has received the written consents of the Petitioners and Respondents to the filing of this brief; those consents have been filed with the Clerk of the Court.

ers due process. U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 1. The record shows that the State of Alabama has been discriminating against foreign corporations for more than eight decades. It also shows that by improperly invoking *res judicata*, the courts below unconstitutionally denied the taxpayers their due process rights.

The "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 335 (1977). To effectuate this purpose, a state taxing scheme will be invalidated if it imposes a higher tax burden on foreign, or out-of-state corporations than on domestic corporations engaged in comparable activity. *Id.* at 329. Moreover, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court held that the presence of either a discriminatory purpose or a discriminatory effect justifies a finding of proscribed "economic protectionism." *Id.* at 272-73.

In contrast to Alabama's domestic franchise tax (which is based on the par value of the corporation's outstanding stock), the State's foreign tax base includes not only that value, but also surplus, retained earnings, long-term and related-party debt, and accelerated depreciation. As a result of the different tax bases, foreign corporations doing business in Alabama are subject to a much higher level of taxation than are similarly situated domestic corporations.

Alabama's discrimination against out-of-state taxpayers is indisputable. Indeed, not one Alabama judge who reviewed the evidence in this case held that the State's franchise tax scheme is constitutional. In spite of the statute's unconstitutionality, the trial court resorted to a strained interpretation of *res judicata* to hold that the taxpayers in this case are barred from litigating this issue. (App. B at

15a-22a.)[2] That decision should not be permitted to stand.

That Alabama's franchise tax does not pass constitutional muster was made manifest by this Court's decision two terms ago in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), in which a North Carolina intangibles tax on the fair market value of stock owned by state residents was examined. Under the state statute, residents owning stock in a corporation that earned income solely within the state paid no intangibles tax, whereas residents with stock of foreign corporations having no in-state activities paid the full amount. Because the tax was computed on a different net base depending on the corporation's in-state activities, it facially discriminated against interstate commerce. 516 U.S. at 327-28, 333 & n.3.

In light of the *Fulton Corp.* case, the Alabama Supreme Court did not hold that the tax is not discriminatory. Rather, the state supreme court simply affirmed a trial court opinion conceding the tax's discriminatory nature but denying taxpayers' constitutional right to contest it on grounds of *res judicata*—specifically, the Alabama Supreme Court's prior decision in *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990). Subsequent decisions of this Court demonstrate unequivocally, however, that the Alabama Supreme Court's 1989 decision in *Reynolds Metals* was wrong. *See Fulton Corp.*, 516 U.S. at 333 (1996 decision holding North Carolina's tax on stock is unconstitutional); *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 104 (1994) (1994 decision holding that the failure to identify a specific charge on intrastate

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[2] "App." references are to the various appendices bound with the Petitioners' Petition for a Writ of Certiorari to the Supreme Court of Alabama in *South Central Bell Telephone Co., et al. v. State of Alabama and State Department of Revenue*, No. 97-2045 (filed June 18, 1998).

commerce equal to or exceeding charge on interstate commerce is fatal to state's claim). What is now clear—if there was ever any doubt—is that the Commerce Clause proscribes any and all discrimination, regardless of intent.

The Alabama trial court's theory of *res judicata* flies the face of the Court's 1996 decision in *Richards v. Jefferson County*, 116 S. Ct. 1761, 1764 (1996). There, the Court held that the State's interpretation of *res judicata* "deprived [the taxpayers] of the due process of law guaranteed by the Fourteenth Amendment." In this case, the trial court perpetuated the Alabama Supreme Court's error in *Richards*. Under the trial court's rationale, businesses would be forced to follow hundreds, if not thousands, of state tax cases—assuming, that is, that an adequate time-sensitive tracking system even existed. Equally troubling, the Alabama decision implies that taxpayers may have to intervene in any case that *might* tangentially affect their interests in order to preserve their rights. As an organization dedicated to minimizing the costs and burdens of tax administration, *amicus* TEI is troubled that such a suggestion might be taken seriously. The courts, too, should be concerned about the deluge of "protective" interventions that would assuredly thwart the goal of judicial economy. Finally, *amicus* TEI is concerned about the court's imposition of a more stringent standard for "large and sophisticated" taxpayers that employ "well known" counsel.

The doctrine of *res judicata* is intended to promote finality and judicial economy by precluding the relitigation of issues where the parties in interest had previously enjoyed "their day in court." As the Court explained in *Richards*, "to contend that the plantiffs in [the prior litigation] somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be 'to attribute to them a power that it cannot be said that they had assumed to exercise.'" 116 S. Ct. at 1768 (quoting *Hansberry v. Lee*, 311 U.S. 32, 46 (1940)). Further-

more, the doctrine does not apply when superseding decisions of this country's highest court have repudiated the basis for the original decision. *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948). The decision below represents an extreme application of *res judicata* in violation of the Due Process Clause.

Viewed in isolation, the decision below is troubling for it suggests a willingness to trample upon the constitutional rights of interstate businesses in order to preserve the vestiges of a discriminatory taxing scheme. Viewed more broadly, consternation becomes despair, for this case represents just another step in States' efforts to avoid paying taxpayers what they are rightly owed—the refund of an unconstitutional tax.

In this case, the Supreme Court of Alabama distended *res judicata* to deny taxpayers a refund of illegally extracted monies. If Alabama prevails here, state courts will become a place where the rules no longer matter. If taxpayers win by the rules, the States will consider themselves free to change them. Such a result cannot be permitted.

After this Court's opinion in *Richards*, Alabama's refusal to craft meaningful relief can only be viewed as defiance. Only five months ago, in *Newsweek v. Florida Department of Revenue*, 118 S. Ct. 904 (1998), this Court signalled its growing irritation with state courts that flout its mandates. *Amicus* TEI submits that this case is similar. Because the Alabama decision is both wrong and unsettling, it should not be allowed to stand. Accordingly, the Court should grant the petition for a writ of certiorari and reverse the decision below.

ARGUMENT

I.

This case involves the questions whether the State of Alabama's franchise tax on foreign, or out-of-state, corporations contravenes the Commerce Clause of the Constitution and whether the State's interpretation of the doctrine of *res judicata* operates to deny the taxpayers due process. U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XIV, § 1. The record shows that the State of Alabama has been discriminating against foreign corporations for more than eight decades. The record also demonstrates that the State's courts have engaged in adjudicatory legerdemain to deny taxpayers due process and hence shield Alabama's violation of constitutional rights from correction.

Foreign corporations doing business within the State of Alabama are subject to a franchise tax based on "the actual amount of . . . capital employed" in the State. ALA. CODE § 40-14-41(a) (1993) (App. G at 91a); *see* ALA. CONST. art. XII, § 232 (1901). The Alabama Code defines "capital" to include not only the par value (or stated value) of the foreign corporation's outstanding capital stock, but also its surplus and undivided profits, long-term debt, certain related-party debt, and accelerated depreciation. ALA. CODE § 40-14-41(b) (1993) (App. G at 91a-92a). Capital employed in Alabama is determined by apportioning total capital to Alabama on the basis of a three-factor formula (property, payroll, and sales). ALA. ADMIN. CODE r. 810-2-3.11 (1991) (App. G at 106a).

Domestic corporations are also subject to an annual franchise tax for the privilege of doing business within Alabama, but the base upon which the domestic tax is computed differs materially from the foreign franchise tax base. Specifically, the domestic tax is imposed solely on the amount of the domestic corporation's "capital stock," which means the aggregate par value of the

domestic corporation's outstanding stock. ALA. CODE § 40-14-40 (1993) (App. G at 90a); *see* ALA. CONST. art. XII, § 229 (1901); *White v. Reynolds Metals Co.*, 558 So. 2d 373, 374 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990). Because the Alabama Code permits domestic corporations to issue stock of low or no par value, those corporations may reduce their franchise tax liability to as little as $50 without changing their size, total capitalization, or the extent of their business activity within or without Alabama—any of which would affect an out-of-state corporation's tax liability. *See* ALA. CODE § 40-14-40 (1993) (App. G at 90a) (domestic franchise tax shall be no less than $50); Stip. Facts ¶¶ 21-23 (App. D at 52a-53a) (corporation may control amount of domestic franchise tax by assigning any value to par value or stated value of its capital stock).

Thus, whereas the domestic franchise tax is based on the par value of the corporation's outstanding stock (which under Alabama law is subject to a domestic taxpayer's control), the foreign tax base includes not only that value, but also surplus, retained earnings, long-term and related-party debt, and accelerated depreciation. The domestic tax rate is $10 per $1,000 of capital stock while the foreign tax rate is $3 per $1,000 of capital employed.

As a result of the different tax bases, foreign corporations doing business in Alabama are subject to a substantially higher level of taxation than are similarly situated domestic corporations. The trial court below accepted a study introduced by taxpayers documenting that the Alabama franchise tax statutes in fact discriminate in favor of domestic corporations. (App. B at 21a n.7 & App. C at 34a-38a.) The study determined that if domestic corporations had been subject to the franchise tax imposed on foreign corporations, the liability of the domestic entities would have been five times higher than it actually was. (App. C at 36a.) For example, the percentage of discrimination in 1988 was 411.11 percent and in 1991, 509.15 percent. *Id.*

The magnitude and consequence of Alabama's discrimination here are indisputable. Indeed, not one Alabama judge who reviewed the evidence in this case concluded or even intimated that the State's franchise tax scheme is constitutional. As the trial court conceded:

> [T]he Taxpayers' evidence in this action clearly and abundantly demonstrates that the franchise tax on foreign corporations discriminates against them for no other reason than the state of their incorporation. Accordingly, the Court finds that the franchise tax on foreign corporations violates the commerce clause of the Federal Constitution.

(App. B at 21a-22a) (footnote omitted).

In spite of the statute's unconstitutionality, the trial court resorted to an extreme application of *res judicata* to bar the taxpayers in this case from litigating this issue. (App. B at 17a-19a.) The Alabama Supreme Court affirmed the decision without opinion. (App. A at 1a.)

II.

The "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 335 (1977). To effectuate this purpose, a state taxing scheme will be invalidated if it imposes a higher tax burden on foreign corporations than on domestic corporations engaged in comparable activity. *Id.* at 329 ("[p]ermitting the individual States to enact laws that favor local enterprises at the expense of out-of-state businesses 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects" [citations omitted]); *see Maryland v. Louisiana*, 451 U.S. 725, 754 (1981); *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72-74 (1963). Moreover, in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court held that the presence

of either a discriminatory purpose or a discriminatory effect justifies a finding of proscribed "economic protectionism." *Id.* at 272-73. Justifications for discriminatory restrictions on commerce must pass the strictest scrutiny. *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 101 (1994).

That Alabama's franchise tax does not pass constitutional muster was made manifest by this Court's decision two terms ago in *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996), in which a North Carolina intangibles tax on the fair market value of stock owned by state residents was examined. Although the tax was assessed at a stated rate, residents could calculate their tax liability by taking a taxable percentage deduction equal to the fraction of the issuing corporation's income subject to tax in North Carolina. Under this scheme, residents owning stock in a corporation that earned income solely within the state paid no intangibles tax, whereas residents with stock of foreign corporations having no in-state activities paid the full amount. Because the tax was computed on a different net base depending on the corporation's in-state activities, it facially discriminated against interstate commerce. 516 U.S. at 327-28, 333 & n.3. *See Maryland v. Louisiana*, 451 U.S. at 760) ("We need not know how unequal the Tax is before concluding that it unconstitutionally discriminates"). Moreover, the tax could not stand as a "compensatory" levy [3] because, as the Court explained, "[s]tate laws discriminating against interstate

[3] There are three conditions for finding that a facially discriminatory tax is compensatory. First, a State must identify the intrastate tax burden for which the State is attempting to compensate. Second, the tax on interstate commerce must be shown roughly to approximate—but not exceed—the amount of the tax on intrastate commerce. Finally, the events on which the interstate and intrastate taxes are imposed must be substantially equivalent; that is, they must be sufficiently similar in substance to serve as mutually exclusive proxies for each other. *Fulton Corp.*, 516 U.S. at 332-33.

commerce on their face are 'virtually *per se* invalid.'" 516 U.S. at 331 (citations omitted).

In light of the *Fulton Corp.* case, it is clear that the Alabama "franchise tax facially discriminates against interstate commerce, and arguments over the degree of discrimination do not affect this characterization." (App. A at 13a) (Maddox, J., dissenting). The Alabama Supreme Court did not rule otherwise. Rather, that court hid behind a lower court opinion conceding the tax's discriminatory nature but denying taxpayers' constitutional right to contest it on the grounds of *res judicata*. The only inference to be drawn from the Alabama Supreme Court's aversion to reaching the merits of the statute is that it recognized the futility of that inquiry under the Commerce Clause.

III.

The trial court ruled that the taxpayers here were precluded from litigating the constitutionality of the franchise tax because of the Alabama Supreme Court's prior decision in *White v. Reynolds Metals Co.*, 558 So.2d 373 (Ala. 1989), *cert. denied*, 496 U.S. 912 (1990). In *Reynolds Metals*, the court found that the franchise tax scheme did not violate the Commerce Clause. In rationalizing its conclusion, the court referred to several purposes for imposing foreign and domestic franchise taxes on different bases:

> ease of regulation and enforcement, differences in the utilization of state natural resources between foreign and domestic corporations, and differences in the employment of state residents and utilization of state services between foreign and domestic corporations.

Id. at 389. The court also cited statements by the Chief of the Franchise Tax Division of the Alabama Department of Revenue that foreign corporations could reduce the amount of their franchise tax liability "merely by forming domestic corporate subsidiaries in this state or

by becoming Alabama corporations themselves." *Id.* at 384.

Subsequent decisions of this Court demonstrate unequivocally that the Alabama Supreme Court's 1989 decision in *Reynolds Metals* was wrong. *See Fulton Corp.*, 516 U.S. at 346 (1996 decision holding that North Carolina's tax on stock is unconstitutional); *Oregon Waste*, 511 U.S. at 104 (1994 decision holding that the failure to identify a specific charge on intrastate commerce equal to or exceeding charge on interstate commerce is fatal to State's claim). What is now clear—if there was ever any doubt[4]—is that the Commerce Clause does not sanction *any* discrimination, regardless of magnitude or intent. In this case, the Alabama trial court labored to fit the square peg of its *Reynolds Metals* decision into the round hole of the Constitution, but it employed Jabberwockian logic to apply *res judicata* in a manner that makes sense only if one does not think about it.

IV.

In reaching its conclusion that this action is barred by *res judicata*, the trial court below seriously misapprehended

[4] The state court's rationale was suspect even before these cases were decided. In *Reynolds Metal*, the Alabama court erroneously equated the standards under which equal protection and Commerce Clause challenges are to be judged. In point of fact, two very different and distinct standards are to be applied: whereas a statute may withstand attack on equal protection grounds where a classification is "rationally related to [a legitimate state] purpose," *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 (1985), the Commerce Clause proscribes *all* taxes that discriminate against interstate commerce, without regard to whether the discrimination is pervasive or intentional, *Maryland v. Louisiana*, 451 U.S. at 760. *See also Halliburton Oil Well Cementing Co.*, 373 U.S. at 73 ("we see no reason to depart from the strict rule of equality"); *Bacchus Imports*, 468 U.S. at 273 ("it is irrelevant to the Commerce Clause inquiry that the motivation of the legislature was the desire to aid the makers of the locally produced beverage rather than to harm out-of-state producers").

this Court's decision in *Richards v. Jefferson County*, 116 S. Ct. 1761 (1996). In doing so, it denied the taxpayers their federal due process rights. U.S. CONST. amend. XIV, § 1.

In considering the Alabama court's theory of *res judicata* here, the Court will no doubt experience an uncanny sense of *déjà vu*. In *Richards*, the taxpayers challenged the constitutionality of a county occupation tax on both state and federal grounds. The county moved for summary judgment on the grounds that the taxpayers' claims were barred by a prior adjudication of the tax by a city director of finance. The trial court granted the county's motion on the state constitutional claims, but refused to do so on the federal claims, which had not been considered in the earlier case. On appeal, Alabama's highest court held that the federal claims were also barred.[5]

In its opinion in *Richards*, this Court unanimously found that Alabama's interpretation of *res judicata* "deprived [the taxpayers] of the due process of law guaranteed by the Fourteenth Amendment." 116 S. Ct. at 1764. In explaining this conclusion, the Court invoked the traditional rule that "extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character.'" *Id.* at 1765 (citation omitted).

Confirming that the "opportunity to be heard is an essential element of due process of law in judicial proceed-

[5] The court reasoned that (i) the complaint in the earlier case had alleged that the county tax violated the Equal Protection Clause of the U.S. Constitution and an equal protection argument had been made in the briefs; (ii) the taxpayers in the prior case adequately represented petitioners because their respective interests were "essentially identical"; and (iii) the county had relied on the prior case in pledging tax revenues and issuing bonds. *Richards v. Jefferson Cty.*, 662 So.2d 1127, 1130 (Ala. 1995), *rev'd*, 116 S. Ct. 1761 (1996).

ings," the Court dismissed the Alabama court's conclusion that *res judicata* applied because the parties were adequately represented in the prior suit. 116 S. Ct. at 1765 n.4 & 1767. To have a binding effect on absent parties, the Court stated, a prior proceeding must at least be—

> so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.

Id. at 1767 (quoting *Hansberry v. Lee*, 311 U.S. 32, 43 (1940)). This requirement was absent in *Richards* because (i) the taxpayers did not sue on behalf of a class, (ii) they did not assert any claim against or on behalf of a class, and (iii) the judgment they received did not purport to bind taxpayers who were not parties to the litigation. 116 S. Ct. at 1767.

In this case, the trial court perpetuated Alabama's error in *Richards*. Specifically, the court misconstrued *Richards* as holding the application of *res judicata* improper only because the petitioners did not receive notice of the prior litigation and were not sufficiently represented in that case. (App. B at 18a.) The trial court averred that the taxpayers here are "large and sophisticated" corporations "well informed in all matters involving issues of national and state taxation and . . . well informed of significant pending legal actions and court decisions." *Id.* Because the taxpayers were aware of the *Reynolds Metals* case at the time it was being litigated and because the taxpayers in that prior case were represented by "well known and excellent counsel"—and, indeed, were represented by the same counsel—the court lowered the bar of *res judicata*, insisting its action did not violate the taxpayers' due process rights. (App. B at 19a.)

Although facile and somewhat beguiling, the trial court's decision does not withstand scrutiny. Not only did the court exaggerate the extent and significance of the overlap of counsel in *Reynolds Metals* and the instant case, but its reasoning is specious.

First, although it is true that one of the petitioners' counsel represented the taxpayers in the *Reynolds Metals* case, the attorney's involvement in the earlier case was limited to seeking a writ of certiorari in this Court. In other words, he did not appear in the Alabama courts. More fundamentally, the Alabama trial court here misapprehends the core purpose of *res judicata*. The doctrine is intended to promote finality and judicial economy by precluding the relitigation of issues where the parties in interest had previously enjoyed "their day in court." *See Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948). Even assuming the taxpayers here had knowledge of the *Reynolds Metals* case (and the record confirms that they did not become aware of the earlier case until after the trial court's decision), the court's assumption that interstate businesses can and should keep track of all cases potentially affecting them is at once perverse and preposterous. Under the court's rationale, corporate taxpayers would be forced to follow hundreds, if not thousands, of state tax cases—assuming, that is, that an adequate, time-sensitive tracking system existed. And it does not. Indeed, in many jurisdictions, trial court jurisprudence is not even published, and the only way a taxpayer could know for sure about such cases would be to travel perpetually from courthouse to courthouse, reviewing every complaint or other pleading lodged in a case. Such a clog in interstate commerce is constitutionally unacceptable. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935).

Even more troubling, the Alabama decision implies that taxpayers should stand ready to intervene in any case tangentially affecting their interests in order to preserve their rights. As an organization dedicated to minimizing the costs and burdens of tax administration to the common benefit of government and taxpayers, *amicus* TEI is astounded that such an impractical and wasteful suggestion might be taken seriously. The courts, too, should be concerned about the flood of "protective" interventions that would assuredly thwart the goal of judicial economy.

Moreover, *amicus* TEI is concerned about the practical effect of the trial court's imposing a more stringent standard on "large and sophisticated" taxpayers who employ "well known" counsel. Will large corporations now be forced to prove they were nevertheless unsophisticated about tax matters in order to safeguard their right to dispute unconstitutional taxes? That their advisers are not well known? Will all large corporations be assumed in privity with one another and to share the same concerns (even though circumstance shows that often not to be the case)? Will small, but sophisticated corporations be subject to the same standard? *Amicus* TEI submits that the size and sophistication of corporate taxpayers, as well as the employment of experienced counsel, should be wholly irrelevant to the assertion—and vindication—of constitutional rights against discriminatory taxation.

Alabama's own case law holds that the doctrine of *res judicata* should be used sparingly to preclude judicial review in tax cases involving different years. *Alabama v. Plantation Pipe Line Co.*, 89 So.2d 549, 569 (Ala.), *cert. denied*, 352 U.S. 943 (1956). This is particularly true for cases involving different tax years *and* different taxpayers. *See Richards*, 116 S. Ct. at 1768. As the Court explained in *Richards*, "to contend that the plaintiffs in [the prior litigation] somehow represented petitioners, let alone represented them in a constitutionally adequate manner, would be 'to attribute to them a power that it cannot be said that they had assumed to exercise.'" 116 S. Ct. at 1768 (quoting *Hansberry*, 311 U.S. at 46). The doctrine simply does not apply when superseding decisions of this country's highest court have repudiated the basis for the original decision. *Sunnen*, 333 U.S. at 599 (*res judicata* or estoppel by judgment "is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers"). The decision below represents an extreme application of *res judicata* in violation of the Due Process Clause. It should be summarily reversed.

V.

Viewed in isolation, the decision below is troubling for it suggests a willingness to trample upon the constitutional rights of interstate businesses in order to preserve the vestiges of a discriminatory taxing scheme. Viewed more broadly, consternation transmutes into despair, for this case represents just another step in States' efforts to avoid providing meaningful relief to aggrieved taxpayers. The last 15 years have seen States propound many an original and unfounded argument to deny taxpayers relief.[6] In many ways these cases are dissimilar. They involved different types of statutes (though with one exception, they all implicated the Commerce Clause rights of interstate businesses). But there are two attributes they generally share. First, they involved a finding by this Court that the State had violated the Constitution in collecting a tax that was imposed (or imposed to a different extent) on a favored class of taxpayers. Secondly, each triggered the same reaction by one or more of the States that imposed the unconstitutional taxes: an effort to avoid the conse-

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[6] *See, e.g., Armco Inc. v. Hardesty*, 467 U.S. 638, 645-46 (1984) (West Virginia's business and occupation tax); *Bacchus Imports*, 468 U.S. at 273 (Hawaii's exemption of local products from the liquor excise tax); *Metropolitan Life Ins. Co.*, 470 U.S. at 882-83 (Alabama's tax on foreign insurers); *Tyler Pipe Indus. v. Washington Dep't of Revenue*, 483 U.S. 232, 248 (1987) (Washington's business and occupation tax); *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266, 286-87 (1987) (Pennsylvania's highway use tax); and *Fulton Corp.*, 516 U.S. at 346 (North Carolina intangibles tax on fair market value of stock). *See also McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (retroactivity of decision overturning Florida statute exempting local products from liquor excise tax); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991) (retroactivity of a case striking down a Georgia statute); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993) (retroactivity of a Supreme Court case); *Reich v. Collins*, 513 U.S. 106 (1994) (same); *Newsweek v. Florida Dep't of Rev.*, 118 S. Ct. 904 (1998) (vacating a decision of the Florida Supreme Court barring the taxpayer from pursuing a refund claim); *Dryden v. Madison Co.*, 118 S. Ct. 1162 (1998) (remanded in light of the *Newsweek* case).

quences of their unconstitutional acts, either by applying the Court's holdings on a prospective-only basis or by construing the States' refund statutes to render pyrrhic the taxpayers' constitutional victory. Now Alabama is trying a new tack: donning judicial blinders to deny taxpayers access to a forum to press their righteous claims.

Obviously, it is not for a lower court to determine that a valid Supreme Court precedent need not be followed. *Quill Corp. v. North Dakota*, 504 U.S. 298, 321 (1992) (Scalia, J., concurring). *Accord Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867) (if the lower court did not adhere to Supreme Court precedent, there would be "mischievous consequences"). Stated simply, that Alabama's courts should arrogate this duty to themselves is to punctuate their failure to appreciate the core values of the federal system and the Supremacy Clause. *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. at 527 (extraterritorial taxation offends fundamental notions of due process and constitutes an "unreasonable clog upon the mobility of commerce"). The States should not be permitted to nullify the mandates of this Court by conjuring up one excuse after another for refusing to return to taxpayers what they had no right to take in the first place.

In this case, the Supreme Court of Alabama embraced a bogus theory of *res judicata* to deny taxpayers a refund of illegally extracted monies. If Alabama prevails here, state courts will become Wonderland, a place where the rules no longer matter. If taxpayers win by the rules, the States—like the Queen of Hearts in her game of croquet [7] —will consider themselves free to change them. The stakes here, however, are much greater than those encountered in a fanciful game of croquet.

After this Court's opinion in *Richards*, Alabama's refusal to craft meaningful relief can only be viewed as

[7] *See* Lewis Carroll (Charles L. Dodgson), *Alice's Adventures in Wonderland*, ch. VIII (1865) (The Queen's Croquet-Ground).

defiance. Only five months ago, in *Newsweek v. Florida Department of Revenue*, 118 S. Ct. 904 (1998), this Court signalled its growing irritation with state courts that resist its mandates. In that case, the State of Florida refused to refund an unconstitutional tax on magazines on the grounds that the taxpayer should have pursued a predeprivation process to challenge the tax scheme. The state court, however, sought to ignore a refund statute that, until that time, had been readily available to the taxpayer. This Court not only granted Newsweek's petition for a writ of certiorari, but also refused argument and summarily vacated the opinion in a *per curiam* decision. In doing so, the Court reiterated its holding in *Reich v. Collins*, 513 U.S. 106 (1994) that "a State may not 'bait and switch' by 'hold[ing] out what plainly appears to be a 'clear and concise' postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists." 118 S. Ct. at 904 (quoting *Reich*, 513 U.S. at 111, 108). *See also Dryden v. Madison Co.*, 118 S. Ct. 1162 (1998) (remanded in light of the *Newsweek* case).

The purpose of the Due Process Clause is to protect constitutional rights against arbitrary actions by the government, but what is more arbitrary than using distended legal principles to deny an opportunity to be heard? What is more arbitrary than consigning taxpayers to the role of Sisyphus, contending that no matter how far up the mountain they role the stone of refund suits, the State remains at liberty to claim it was not far enough and to push the stone down the mountainside. In *Richards*, this Court admonished Alabama against distorting the doctrine of *res judicata* to prevent taxpayers from seeking redress of wrongs in a court of law. But the courts below did not hear.

Amicus TEI submits that the parallels between this case and *Newsweek* are compelling. The courts below have admitted that the Alabama franchise tax is unconsti-

tutional. But they have nevertheless denied taxpayers relief, raising a spurious procedural obstacle that was rejected outright in *Richards*. And they have done so, betting that this Court will decline to issue a writ of certiorari. Its gambit should not succeed.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

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